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CITATIONS

604606—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 286

ALUMINUM COMPANY OF AMERICA, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the Board of Tax Appeals (R. 4–28) are reported in 47 B. T. A. 543. The opinion of the Circuit Court of Appeals (R. 49–63) is reported in 142 F. 2d 663.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 28, 1944 (R. 64). The petition for a writ of certiorari was filed on July 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Is petitioner liable under Section 3 of the Vinson Act to repay into the Treasury profits in excess of 10 percent of the contract price of aluminum furnished during the years 1936, 1937 and 1938 for the construction of naval vessels and aircraft or portions thereof?

2. Petitioner urged before the Board of Tax Appeals that in computing profit it was entitled to ascribe to metal on hand at the time of enactment of the Vinson Act a cost equal to its value on that date. The Board decided this point against petitioner, and petitioner did not appeal. However, on the Commissioner's appeal to the Circuit Court, petitioner renewed the argument. Was petitioner, having failed to appeal, in a position to raise this point and, if so, does it contain any merit?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations appear in the Appendix, *infra,* pp. 16–24.

STATEMENT

This case involves the petitioner's liability under Section 3 of the Vinson Act[1] to pay into the Treasury profits in excess of 10 percent of the contract price of aluminum furnished during the years 1936, 1937 and 1938 for the construction

[1] Act of March 27, 1934, c. 95, 48 Stat. 503, as amended by the Act of June 25, 1936, c. 812, 49 Stat. 1926.

of naval vessels and aircraft or portions thereof. Section 3 (b) of the Act provided for the collection of such excess profits by the usual methods employed under the internal revenue laws to collect federal income taxes. Following determinations of deficiencies for the years in question by the Commissioner of Internal Revenue, petitioner filed petitions for redetermination with the Board of Tax Appeals (R. 2, 3, 4). The facts found by the Board may be summarized as follows:

Petitioner, a Pennsylvania corporation, with its principal office in Pittsburgh, was engaged in the business of producing, purchasing and selling aluminum and its alloys either as ingot or in partly or wholly fabricated forms (R. 6). During the years 1937 and 1938 it delivered, pursuant to job contracts, aluminum materials to prime contractors engaged in the construction of complete naval vessels. Under this type of contract, petitioner agreed to furnish, and the prime contractor agreed to buy, not less than, nor more than, designated amounts of described aluminum materials for use in the construction of a named naval vessel or vessels. The material was to be sold at prices stated in the contract for particular classes of material, reference being made for prices to petitioner's regular published price list incorporated in the contract, but the purchaser was not required to buy any quantity of

any particular class of material. (R. 7–8.)[2] In addition to the aluminum furnished under the job contracts, petitioner furnished, during the years involved, for use in construction of naval vessels and aircraft or parts thereof, certain aluminum materials on orders received from customers (R. 11–14).[3]

With the exception of small amounts of certain quilting bolt nuts made specially for use in naval vessels, all of the materials furnished under these job contracts and orders were regular commercial products. At least 98 percent of petitioner's commercial products were used by other purchasers for purposes unrelated to the Vinson Act. The prices charged for the materials furnished under these job contracts and orders were identical with the prices charged other purchasers for like materials, and the procedure in the handling of the orders, the processes of manufacture, the method of shipping and accounting was the same as that followed under other commercial orders. (R. 9–10, 11.)

After delivery by petitioner, the aluminum materials, except for small quantities of screws, nuts and bolts, required further extensive fabrication. This fabrication involved operations such as the cutting to size, forming, punching, riveting,

[2] The excerpts appearing in the Record at pages 30–33 are excerpts from a typical contract of this kind.

[3] The excerpts appearing in the Record at pages 34–45 are typical of this kind of order.

welding, drilling, perforating, painting and assembling of sheet, plate, and structural and extruded shapes, the forming, threading, drilling, welding, riveting and installation of tubing, the machining of rod and bar, and the grinding, drilling and threading of sand castings. Such fabrication resulted in radical distortion in size and shape of the material furnished by petitioner and its conversion into new and different forms. (R. 10, 12, 14–15.)

The Commissioner of Internal Revenue determined that petitioner was subject to the profit-limiting provisions of the Vinson Act with respect to the business which has been described above, and determined a deficiency in the petitioner's excess profit liability for the years 1936, 1937 and 1938, accordingly. The Board of Tax Appeals held, three members dissenting, that with respect to the described business petitioner was not subject to the profit-limiting provisions of the Vinson Act, and entered decisions accordingly. (R. 4–29.) The Commissioner appealed and the Circuit Court of Appeals reversed, holding that the profit-limiting provisions were applicable to the described business (R. 49–63).

In addition to the job contracts and orders referred to above, petitioner held certain prime contracts with the Navy upon which it was concededly subject to profit limitation (R. 7). Petitioner contended before the Board of Tax Appeals that its profit on these contracts (and on the job

contracts and orders, if it should be held that profit limitation applied to them) should be computed by taking as the cost of the metal the value thereof at the date of its appropriation to the respective contracts, or in the alternative, that with respect to metal on hand on the date of enactment of the Vinson Act the cost of that metal should be taken to be its fair market value on that date. The Commissioner contended that the cost of the metal was the actual amount expended in acquiring or producing it. (R. 6–7.) This issue was decided against petitioner and petitioner did not appeal (R. 23–25, 63).

In the Circuit Court of Appeals, petitioner renewed the alternative contention which it had made before the Board, namely, that if it should be held subject to profit limitation on the job contracts and orders, then with respect to metal on hand at the time of enactment of the Vinson Act the fair market value of such metal on that date should be taken as its cost for the purpose of computing the amount of prof Although the Government did not argue that petitioner was not in a position to raise this question insofar as it related to the job contracts and orders, the Circuit Court of Appeals held that since the Board had ruled upon this issue adversely to petitioner and petitioner had not petitioned for review, petitioner could not raise it in the appellate court. (R. 62–63.)

ARGUMENT

1. As its title indicates (48 Stat. 503), the Vinson Act was enacted in order to authorize the President to bring the navy up to the strength allowed by the Washington and London naval treaties. The profit-limiting provisions embodied in Section 3 (Appendix, *infra*, pp. 16–17) were designed to serve the double purpose of achieving economy in the cost of the program and of preventing the making of unconscionable profits out of the Nation's need for defense. This Section provided for the inclusion in all contracts made for the construction of any naval vessel or aircraft, or portion thereof, of a provision requiring the contractor to pay into the Treasury all profits in excess of 10 percent of the contract price and to make no subcontract unless the subcontractor agreed to similar conditions. All contracts were also to provide that no subdivision of any contract or subcontract should be made for the purpose of evading the provisions of the Act, but that all subdivisions of any contract or subcontract were to be subject to the same conditions. Section 3 further provided that it was to be applicable only to contracts or subcontracts in which the award exceeded $10,000.

With respect to the primary question here involved, *i. e.*, the scope of Section 3, we think that the decision of the Circuit Court of Appeals is plainly correct and since there is no conflict and

the whole question is of limited importance, there is no occasion for further review.

(a) Petitioner contends that Section 3 applies only to contractors and subcontractors and that one who supplies material for use in the performance of a contract cannot be a subcontractor within the meaning of the Act. However, it is clear, as petitioner concedes (Pet. 18–21), that under the regulations promulgated jointly by the Secretaries of the Navy and Treasury under the Vinson Act, the job contracts and orders here involved are subject to profit limitation. See Articles 1 (g) and 2 of T. D. 4723 (Appendix, *infra,* pp. 20–21). As the Circuit Court of Appeals pointed out (R. 58–62), this has been the consistent administrative construction under this and similar legislation by the War, Navy and Treasury Departments, and the Maritime Commission; the attention of Congress was expressly and specifically drawn to this very point on at least two occasions when it was engaged in revision of this legislation (see R. 58–60), and upon one of these occasions it was charged that application of profit limitation to suppliers of material constituted a serious impediment to expeditious development of the national defense program; that nevertheless, and despite the fact that in statutes enacted in 1936, 1939 and 1940, many detailed changes were made in this legislation, Congress did not see fit to change this as-

pect of its operation; and finally when the Board's decision in the instant case cast doubt upon the meaning of similar language used in Section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942, c. 247, 56 Stat. 226, the original renegotiation provision, Congress specifically incorporated the administrative construction into the law by Section 801 of the Revenue Act of 1942, c. 619, 56 Stat. 798 (50 U. S. C. App., Supp. III, Sec. 1191). (See R. 58–62.)

This legislative history presents an unquestionably plain case of Congressional approval of the administrative construction, and under the familiar rule the regulation must be given the force and the effect of law. *United States* v. *Dakota-Montana Oil Co.,* 288 U. S. 459; *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Helvering* v. *Griffiths,* 318 U. S. 371, 395–397. There is therefore no basis for petitioner's contention that the regulation is invalid and should have been struck down.

There is no warrant for petitioner's charge (Pet. 20–21) that the administrative construction was not consistent and was not followed in actual practice. This charge is based upon a statement in an unpublished memorandum (Pet. 31–38) prepared in the Office of the Under Secretary of the Navy in which it is said (Pet. 35):

> It would not appear that in the application of the Vinson-Trammell Act any attempt was made to go beyond the first tier of

> subcontractors; that is, there is nothing to indicate that it was applied to sub-subcontractors.

However, this is by no means a statement that in the administration of the Vinson Act, applicability of the profit-limiting provisions was cut off in practice at "the first tier of subcontractors". It is merely a statement that so far as the investigation of the Vinson Act conducted by the writers of that memorandum disclosed (an investigation which appears to have been confined mainly to the correspondence of the Judge Advocate General of the Navy), they had found no instances of application of the profit-limiting provisions of the Vinson Act to "sub-subcontractors". The memorandum does not state that its writers had found anything to indicate that the Act had been held to be not applicable "beyond the first tier of subcontractors". The administrative construction is shown by the officially published regulations (cf. *Helvering* v. *N. Y. Trust Co.,* 292 U. S. 455; *Biddle* v. *Commissioner,* 302 U. S. 573; *Estate of Sanford* v. *Commissioner,* 308 U. S. 39), and in any event there is no inconsistency between the memorandum and the regulations.

(b) Since the instant case is the only decision of a Circuit Court of Appeals upon this aspect of the Vinson Act, there is no direct conflict upon the question. Moreover, the decision not only does not conflict with the rationale of *MacEvoy*

Co. v. *United States,* 322 U. S. 102, which arose under the Miller Act,[4] but indeed follows the teaching of that case that the meaning of the word "subcontractor" must in each instance be ascertained from the purpose and context of the statute in which it appears. The *MacEvoy* case points out (322 U. S. at p. 108) that "the word has no single exact meaning", that it may include "one who has a contract to furnish labor or material to the prime contractor" and refutes petitioner's suggestion (Pet. 8, 14–18) that it is an immutable word of art which cannot in any circumstances include a supplier of material.

(c) The issue does not seem to be one of such widespread importance as to warrant further review in the absence of a conflict. The profit-limiting provisions of the Vinson Act have been suspended for the future by Section 401 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, and a survey made by the Bureau of Internal Revenue reveals that the cases pending in the Bureau or before the Tax Court total only eleven and that the gross amount involved in these cases totals approximately $290,000.

2. The court below held that petitioner could not raise there the contention that its profits should be measured by ascribing to the metal on hand at the time of enactment of the Vinson Act a cost equal to its value on that date.

[4] Act of August 24, 1935, c. 642, 49 Stat. 793.

Although the Government did not suggest to the court this disposition of the issue, the court rested its conclusion on *Helvering* v. *Pfeiffer,* 302 U. S. 247. Compare such cases as *LeTulle* v. *Scofield,* 308 U. S. 415; *Ryerson* v. *United States,* 312 U. S. 405; and *Helvering* v. *Lerner Stores Corp.,* 314 U. S. 463. In any event, we do not believe that the instant case affords a proper vehicle for determination of any procedural question which might be thought to be present, since we think it plain that in this litigation the point has no more than academic interest, for there is no merit in petitioner's substantive contention.

Before the Board of Tax Appeals, petitioner contended that its profit on all of the business involved should be computed by taking for its "cost" (sec. 3 (e) of the Vinson Act) the market value of the metal at the time it was appropriated to the various contracts. But as the Board held (R. 23–25), there is no warrant either in the Act or the regulations for such a course.

The Act provides that the method of ascertaining the amount of profit shall be determined by the Secretaries of the Treasury and Navy. Pursuant to this authorization, T. D. 4434, Appendix, *infra,* pp. 19–20) provided that the cost of performance should be the direct costs, such as labor and material, plus a reasonable

proportion of indirect costs appertaining to the contract. Article 8 of T. D. 4723 (Appendix, *infra,* pp. 21–24) contains similar language, and in addition defines, in general, the elements of cost. It will be observed that this regulation provides that factory cost shall include the cost of material "purchased for stock and subsequently issued for contract operations", and furthermore specifically lists as among the items not includible in cost "amortization of unrealized appreciation of values of assets" (pp. 22, 23, *infra*).

Petitioner's theory of computation of profit would, as the Board pointed out (R. 24), defeat the fundamental purpose of the Act, and indeed would nullify application of the Act to the petitioner for, under petitioner's view, all of its profit would have been earned in the production of the aluminum (since at the time of sale it was worth the price it then brought) and there would be no profit upon which the Vinson Act could apply.

In the Circuit Court of Appeals, petitioner limited its contention upon this issue to the narrower ground that its theory should be applied to so much of the metal as was on hand on the date of the enactment of the Vinson Act. But the entire theory is baseless, and there is certainly nothing in the Act or the regulations to support differing methods of computation of profit turning upon when the contractor acquired the raw materials.

In no sense is the question one of retroactive application of the Vinson Act. The question simply is, what was petitioner's profit when it sold the aluminum here involved? It would seem to be plain that if it cost a certain amount to produce a pound of aluminum which was later sold for a larger amount, the profit would be the difference between the former and latter sums regardless of when the aluminum was produced.

The cases cited by petitioner (Pet. 25) are not in point. *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179; *Hays* v. *Gauley Mt. Coal Co.*, 247 U. S. 189; and *United States* v. *Cleveland &c. Ry. Co.*, 247 U. S. 195, turned largely upon the consistent administrative interpretation of the statute there involved. See 247 U. S. at pp. 185–187. In *Lynch* v. *Turrish*, 247 U. S. 221, the statute specifically stated that only income accruing after March 1, 1913, should be subject to tax. Moreover, all of these cases involved capital gains (the opinions stress this point) and were decided at a time when it was still a lively question whether capital gains were income at all, a question not finally settled until the decision in *Merchants' L. & T. Co.* v. *Smietanka*, 255 U. S. 509. See Magill, Taxable Income 28, note 17, 93 *et seq.*

An income tax case more closely parallel to the question here involved is *Lynch* v. *Hornby*, 247 U. S. 339. There it was held that the entire

amount of a corporate dividend was taxable as income, even though it was extraordinary in amount ($650,000 on a capital stock of $1,000,000) and represented earnings of the corporation prior to March 1, 1913.

CONCLUSION

The decision below is correct and involves no conflict of decisions or question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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